

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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In re

ROBERT C. AUGSTEIN

Case No. 00-12460

Debtor

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ROBERT C. AUGSTEIN

Plaintiff

-against-

Adv. Pro. No. 01-90056

STATE EMPLOYEES FEDERAL CREDIT  
UNION

Defendant

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APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

**MEMORANDUM-DECISION AND ORDER**

The current matters before this court are dueling motions for summary judgment relating to an alleged preferential transfer. The court has jurisdiction via 28 U.S.C. §§ 157(a),

157(b)(1),157(b)(2)(F) & 1334(b).

## **FACTS**

Based on the pleadings submitted, including the stipulation of facts by the parties, the court finds the following:

1. On March 9, 2000, the State Employees Federal Credit Union (“SEFCU” or “Defendant”) obtained a judgment against Robert C. Augstein (“Plaintiff” or “Debtor”) in the New York Supreme Court, Albany County in the amount of \$18,228.16.
2. On the same day, the judgment was docketed at the Albany County Clerk’s Office.
3. The judgment was subsequently transcribed and docketed in the Green County Clerk’s Office on April 3, 2000.
4. On May 1, 2000, Plaintiff filed a chapter 13 petition.
5. On or about August 24, 2000, the Debtor’s plan was confirmed.
6. On March 28, 2001, the Debtor commenced an adversary proceeding against Defendant, alleging a preferential transfer occurred when the transcript of the judgment was docketed in Greene County.
7. On June 18, 2001, the Defendant submitted an answer with two affirmative defenses: A) Plaintiff’s complaint fails to state a cause of action, and B) the judgment lien does not constitute a transfer of interest of the Debtor in property.
8. On July 12, 2001, the Plaintiff filed a motion for summary judgment.
9. On July 23, 2001, the Defendant replied with its own motion for summary judgment.
10. Subsequent to the motions for summary judgment, the parties stipulated to allow the intervention of Andrea E. Celli the Chapter 13 Standing Trustee (“Trustee”).<sup>1</sup>
11. The parties agree that the filing of the transcript of the docket of judgment satisfies the fifth

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<sup>1</sup>In its motion for summary judgment, the Defendant argued that the Plaintiff did not have the standing to bring this adversary. The stipulated intervention of the Trustee renders that issue moot.

prong of 11 U.S.C. § 547(b).<sup>2</sup>

## DISCUSSION

Initially, it is to be noted that the Defendant's answer neither admitted nor denied Plaintiff's allegations regarding the five prongs of § 547(b). Clearly however, the docketing was for the benefit of SEFCU, on account of an antecedent debt, made within ninety days of filing while the Debtor was insolvent, enabling Creditor to receive more than it would under Chapter 7. Thus, the numbered paragraphs of § 547(b) have been met. However, the crucial issue is whether the docketing of Defendant's judgment in Greene County is a "transfer" as contemplated by § 547(b).

"Transfer" is defined in § 101(54), in part, as:

every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property...

This definition is meant to be as broad as possible. S. REP. NO. 989, 95<sup>TH</sup> CONG., 2D SESS. 27 (1978). Nonconsensual transfers such as executions obtained through judicial proceedings are within the purview of this definition. *In re Cockreham*, 84 B.R. 757 (D. Wyo. 1988)(citations

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<sup>2</sup>11 U.S.C. § 547 is entitled "Preferences" and subsection (b) states, in relevant part:  
(b) [t]he trustee may avoid any transfer of an interest of the debtor in property -  
(1) to or for the benefit of a creditor;  
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;  
(3) made while the debtor was insolvent;  
(4) made -  
(A) on or within 90 days before the date of the filing of the petition ...  
(5) that enables such creditor to receive more than such creditor would receive if -  
(A) the case were a case under chapter 7 of this title;  
(B) the transfer had not been made; and  
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

omitted); *See Collier on Bankruptcy* § 547.03(1)(a) and *Norton Bankruptcy Law and Practice* 2<sup>nd</sup> § 57:28.

In New York, CPLR § 5203(a) provides the docketing of a judgment creates a lien on realty of the judgment debtor located in the county where the judgment is docketed. Additionally, CPLR § 5018 states once a transcript of the docket of the original judgment has been filed and docketed, it has the same force and effect as the original judgment. Thus, the docketing of the transcript of the docket of the judgment in Greene County created a lien in favor of Defendant against the Plaintiff's real property located in that county.

Defendant argues that the docketing in Greene County did not cause the Plaintiff to part with anything because no transfer of ownership was accomplished by the docketing of the transcript. While it is true that the docketing did not cause a "parting with property" within § 101 (54), it did cause a "parting of an interest in property" as defined by that section. Clearly, a portion of the fee interest of the Plaintiff was lost upon the docketing. Any subsequent transfer of the property would be ineffective against SEFCU; they became part of the chain of title when the transcript of the docket of the judgment in Greene County was docketed.

As indicated by the Plaintiff in his brief, an unsecured creditor greatly improves its position with the docketing of a judgment when a debtor owns real property. Unless the lien is specifically avoidable under other sections of the Bankruptcy Code, the judgment (formerly unsecured) creditor will either be treated as secured and paid through the plan or the lien will survive the proceeding. Additionally, the judgment lien will cause a diminution of the equity available to other unsecured creditors. This could cause a lowering of the amount paid to

unsecured creditors pursuant to § 1325(a)(4).<sup>3</sup>

Defendant cites *In re Biggers*, 249 B.R. 873 (Bankr. M.D. Tenn. 2000), as support for its position that no transfer has taken place. However, *Biggers* is factually distinguishable. *Biggers* involved a perfected security interest in a vehicle held by a creditor that had merged with another entity. The successor entity refinanced the vehicle and executed a new security interest. *Id* at 874. The trustee argued that the granting of the new security interest was a preference; the creditor countered by asserting that its successor status gave the lien continuous perfection. *Id* at 875. The *Biggers* court ultimately ruled that no preference had occurred by looking at the transaction as a whole to see if the estate had been diminished. *Id* at 878. However, that analysis grew from the core situation involving a collateral substitution or renewal of liens.

In the instant case, the docketing of the transcript of judgment in Greene County created a new lien on the Debtor's real estate and thus provides the classic backdrop for all the elements of § 547(b). The Court finds that the above action fits squarely within the meaning of "transfer" as defined in § 101(54).

For all the above reasons, the summary judgment motion of the Defendant is denied and the summary judgment of the Plaintiff is granted.

It is so ORDERED.

Dated: September 6, 2002

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Hon. Robert E. Littlefield, Jr.  
U.S. Bankruptcy Judge

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<sup>3</sup>Section 1325 is entitled "Confirmation of plan" and subsection 4 states: the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.